IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
June 18, 2007 Session

DICK WAGER v. LIFE CARE CENTERS OF AMERICA, INC.

Appeal from the Chancery Court for Bradley County
No. 03-008 Jerri S. Bryant, Chancellor

No. E2006-01054-COA-R3-CV - FILED NOVEMBER 30, 2007

This case focuses on the aftermath of the eight-month tenure of Dick Wager ("President") as president of Life Care Centers of America, Inc. ("Company"). President sued Company for breach of contract, claiming that he is entitled to an unpaid $500,000 severance that was payable upon his "leaving employment . . . for any reason." President also claims he is entitled to two equity options worth approximately $1,500,000 that were scheduled to vest within six months of his start date at Company. Company says it was justified in refusing to give President the severance and the equity options after he was forced to resign. With regard to the severance, Company argues that the "for any reason" language in the parties' contract is ambiguous and was not intended to apply to a situation like this one, in which, according to Company, President breached his contract by maintaining improper relationships with outside vendors. President argues that the relationships in question were not improper and that, in any event, Company had advance notice of them. Each party asserts that the other acted in bad faith. The trial court found that neither party acted in bad faith, and awarded President the $500,000 severance on the basis of the "for any reason" language, but declined to award him the equity options. Company appeals, arguing that President is entitled to nothing; President asserts that he is entitled to both the severance and the equity positions. We affirm the trial court's ruling in both respects.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed; Case Remanded.

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J. and D. MICHAEL SWINEY, J., joined.

H. Chris Trew, Athens, Tennessee, for the appellant, Life Care Centers of America, Inc.

John C. Cavett, Jr., Chattanooga, Tennessee, for the appellee, Dick Wager.

OPINION

I.

In the summer of 2001, Forrest Preston ("Owner"), Company's chairman of the board, C.E.O., and 100% stock owner, contacted President regarding whether he was interested in becoming the Company's president. At the time of the contact, President owned and operated Fulcrum Management, which had partnerships with several vendors in the medical field including Waste Tech, Cignify and KVM Technologies. He also had an ownership interest in Vanguard Healthcare.

President had previously worked for Company, in 1985 and later in 1988. He was interested in the opportunity of returning to Company as its president, but was concerned about what he describes as a high turnover rate for past presidents of Company. President knew he would have to give up a number of valuable business investments and opportunities, which he estimated to be worth about $2 million, in order to take the position at Company, and he was concerned about the prospect of making these sacrifices and then only being permitted to serve a short tenure as Company's president. In his correspondence with Owner, President made clear that he only wanted the job if it was set up "to be a very long term commitment for both of us," with a "time horizon of at least ten years." In addition, President negotiated for hefty financial guarantees in his contract, essentially as a hedge against the loss of the investments he would have to give up to take the position at Company. Those guarantees form the crux of this dispute.

In his initial written proposal of September 22, 2001, entitled "Outline for the President Position" ("Exhibit 3"), President proposed a "Deferred Compensation Plan" into which an "initial deposit" of $2 million would be made "upon the first day of employment," followed by additional $250,000 annual deposits and quarterly interest payments starting at the end of his third year on the job. He also included a "voluntary termination without penalty" clause which sought to ensure that, if President's "role is materially reduced in scope, authority, title, or there are significant barriers to performance of the role that are created by [Owner], or could be reasonably be [sic] removed by [Owner] and are not," President would be able to resign without sacrificing accrued deferred payment amounts that had not yet vested. Upon his resignation under the "voluntary termination" clause, any deferred payment amounts already accrued, or due to accrue within the following year, were to become immediately vested and payable within 180 days. Also, President was to receive one year of severance pay.

At a face-to-face meeting on October 1, 2001, Owner suggested some changes to the proposed payment scheme outlined in Exhibit 3. His suggestions restructured President's proposed severance and deferred compensation package significantly, but still maintained the basic premise that President would be well compensated upon his departure from Company even if that departure were to occur early in his tenure. Instead of an initial $2 million deposit into a deferred compensation account, Owner proposed that President be entitled to a $500,000 severance package, payable upon his departure, and another $1.5 million in equity positions, which would vest no later than six months after the start of his employment. President testified at trial about how these

changes came about, and how the new proposal was still related to his overarching goal of protecting himself from an unanticipated premature departure:

> A: . . . What I had said to Forrest in this meeting and previous to this meeting was that what I needed to be able to come there, again, knowing the history [of presidents having short tenures] and knowing what I'm going to give up if I go there, emotionally and otherwise to go there, that I needed to have something that he is not going to manage to get himself out of as I had witnessed be done, you know, many times in the past. So I needed something that said as soon as I walk in that door, I'm giving up two million dollars plus worth of opportunities, and so, I want you to guarantee me when I walk in that door that I made a two million dollar decision, and that if something happens, which, of course, wasn't going to be me [voluntarily] leaving, but something happens and I've seen a lot of bizarre things happen there, if something happens where I'm going to be gone, then you can go ahead and do that, which is going to break my heart and embarrass me and everything else, but I'm going to get paid for doing that.
>
> Q: And did the two million dollar figure have any relation to the value of these businesses?
>
> A: Yes, it did. Not just the [Fulcrum] consulting business, but, frankly, the KVM Technology business was truly a huge opportunity if I could jump on it and I really needed to jump on it right when I was dealing with it if it was going to have that value.
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> Q: What was Mr. Preston's reaction in the meeting, if any, to this two million dollar discussion?
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> A: . . . [H]e never really said, Well, there's no way I'm going to do two million dollars. I mean, . . . being a good negotiator, [he] did not, you know, just butt heads on that, but he had a proposal on this particular day.
>
> Q: And what was that?
>
> A: He had . . . [a] torn piece of paper, and on there he had written these numbers, and it basically was what he referred to as an equity plan. It's really a deferred compensation plan[.]
>
> * * *

> [He said] I will give you . . . 25 percent of two different nursing homes and equity in those nursing homes and . . . [he] said that that 25 percent interest after a year and a half was worth about a million and a half dollars. And instead of my two million dollar number, you know, he had – you know, we had gotten to half a million dollar [severance] number.
>
> And, you know, I could, of course, connect the dots here. We're trying to get ourselves to this two million dollar number. So we've got three pieces here. We've got an absolute guarantee: You walk in there. If one minute later you're gone for any reason, half a million dollars. I wanted to have the equity day one so that everything is, in fact, day one. That two million dollars is covered. But in negotiations we ended up with, well, that will happen within the first six months.

President would later testify that he "was determined" that "the two million dollar number . . . would be part of this deal or I'm not coming," so the interaction of the $500,000 and the $1.5 million was critical. Ultimately, according to President, he was satisfied with Owner's offer:

> So that was the deal that we ended up agreeing with, and in my mind, you know, we – because to be gone in less than six months, even in Life Care, that wouldn't likely happen, you know. So I felt like effectively as soon as I get there, I've got my – I'm covered, and now I'm ready to commit, you know, to be here for, you know, hopefully the rest of my career.

Owner's testimony confirmed that he indeed made this proposal to President.

On October 2, President e-mailed Owner, stating, "I appreciate the quality time that we spent together yesterday" and promising to "give everything careful thought and call you Friday [October 5] as planned." He then proceeded to write as follows with regard to his potential business conflicts:

> Although I do not agree that my ownership in Vanguard would be a problem for [Company] or anyone working there, I understand your point. I have ownership in a number of other health care companies. Are these a concern:
>
> - Two institutional pharmacies serving nursing homes in TN and MS
> - Fulcrum Management Centre - this company does consultation (5 people); sells proprietary software; has partnered with a number of software companies to provide consulting, support,

and installation training for current and new customers; other activities.
- KVM - We have discussed. I want to think on this one and get back to you on Friday.

I personally do not believe that the pharmacy investments should be any concern to [Company]. The consulting company [Fulcrum] currently takes a great deal of my time, but my plan has been (long before our discussions) that the first of the year it would have the leadership, market relationships, and business stream that I would step out of running it. Ownership is currently only me, but by year end it was going to give 60% to the principle [sic] consultants I have on board, who will take it [and] go. I propose I go ahead and do that by the first of the year, at which point I am a totally uninvolved equity investor. It is not like running a company with mortgages and other liabilities (like Vanguard) where I might feel I need to keep more of an eye on it. I have put together a neat team, they have made decisions based on where this little company was headed. I feel some obligation to them, and because of several factors, my complete non-involvement might jeopardize the business stream I have created. If necessary, if I had to get out, I would like to do so by the 4th Q of 2002 to insure they have that revenue stream. Although I would not be out under this plan until a year from now, I would have absolutely no work, meetings, or any other time commitment after January.

This e-mail would ultimately become known as "Exhibit 5," and became the focus of much discussion at trial, as to whether it constituted full disclosure to Company by President of his various business involvements. Owner testified that he did not remember seeing the e-mail as of the date it was sent. The trial court ultimately held that Owner *had* received it, but that it did not constitute a full written disclosure. That issue will be discussed in more detail later in this opinion.

Three days later, on October 5, President sent Owner another e-mail, this time with an attached document, entitled "Revised Information Related to the President Role," which essentially reflected the terms proposed by Owner at their October 1 meeting. This document would come to be known as "Exhibit 8." With regard to the aspects of President's compensation that are at issue on appeal, Exhibit 8 states as follows:

Facility Equity Program
- The intention is that the primary equity earnings will come through this equity program.
- During the first six months of employment Wager will be given a 25% equity position in a nursing home that will result in little or no tax impact based on its current value.

- During the first six months of employment Wager will be given a 25% equity position in a nursing home that will intend to have just sufficient enough losses to offset earnings from wages and return on equity.

* * *

Severance Package

- Upon leaving employment of Life Care *for any reason*, a payment will be made to Wager in the amount of $500,0000.

(Formatting in original; emphasis added). The "Severance Package" section is quoted above in its entirety.

Exhibit 8 also contains a section entitled "Special Obligations of Wager," under which President promised that he would, "[w]ithin six months of employment[,] . . . sell or otherwise remove himself from ownership in Vanguard Heathcare." He also agreed not to accept a position on the KVM Technologies board of directors and not to purchase an equity interest in a Mississippi pharmacy that he had an option to buy. Company claims in its brief on appeal that, in addition to these specific written promises, there was a broader oral agreement "that Wager would divest himself of his involvement with Fulcrom [sic] Management and its partner vendors after January 2, 2002, certainly with respect to new business ventures with partner vendors." Owner testified at trial that he believed their agreement included an understanding that "divestiture was mandatory in every form," that "divestiture had to be before" President's tenure began, and that divestiture had to be "total," meaning President would have "no relationship at all" with the companies in question. Owner acknowledged that the parties' written agreement did not include the terms "total divestiture" or "totally divest," but he stated that these concepts were orally agreed to.

President testified that he believed "[t]he spirit of our agreement, our discussions, was that . . . I'm not going to be, certainly *me personally*, out there trying to get new business" (emphasis added). According to President, continuing to collect fees from unrelated prior transactions was allowed, as was benefitting from partner vendors' transactions in which he had no personal involvement on either end.

On October 12, Owner and President met face-to-face, apparently for the first time since President had sent Exhibit 8 to Owner. President testified as follows about this meeting:

> A: Well, we met again on this day, October 12, and we went over the document that, you know, I had sent him. I wouldn't have been surprised if he had other suggestions or changes to be made in it, but he didn't. And so . . . we, you know, concluded this, signed off on it, dated it. You know, he had this letter typed while I was basically

> standing there, and we – you know, he signed it and gave me my copy and shook hands . . .
>
> Q: So this letter was actually handed to you on October the 12th in person.
>
> A: Correct.
>
> Q: And when this letter in the second paragraph says, "This response is attached," what does the word "response" refer to? And you might want to look at Exhibit 8.
>
> A: Yeah, it – [Exhibit 8] was the, you know, the state of agreement, as I thought it was and he confirmed when we met, that these are the terms that we're agreeing to.

President and Owner both initialed each page of Exhibit 8, thereby paving the way for President to become president of Company effective January 2, 2002.

On his first day on the job, President signed a document acknowledging that he had "received, read and will abide by" Company's "Code of Conduct." The Code is a 28-page document covering a wide variety of topics, but the portions relevant to the issues on this appeal are as follows:

> All associates will receive a copy of the Code of Conduct and are expected to read it, certify receipt and agree to abide by it. The principles contained herein are requirements of your employment with Life Care. This means that each associate, regardless of position, must always comply with applicable laws and our standards of business behavior. Enforcement may include progressive disciplinary action, or immediate termination depending on the circumstances.
>
> * * *
>
> Life Care has adopted the following principles in designing its Code of Conduct
>
> 1) to conduct our business in compliance with applicable laws; . . .
>
> 5) to refrain from real or perceived conflicts of interest in business dealings;
>
> * * *

Federal and state laws prohibit any form of kickback, bribe or rebate made directly or indirectly, overtly or covertly, in cash or in kind to induce the purchase, recommendation to purchase or referral of any kind of health care goods, services or items paid for by federal healthcare programs. An offense is classified as a felony and is punishable by fines and imprisonment.

You should become familiar with these laws and assure that all business relationships are conducted in such a manner so that no question may arise as to whether any of these laws have been violated.

* * *

You are expected to select life Care's business partners solely on their merits, in the interest of Life Care, and without regard to non-business considerations.

The following examples illustrate the kinds of relationships with business partners that are prohibited:

– Personal financial involvement or ownership of a substantial interest that has not been disclosed and approved in accordance with Life Care's Conflict of Interest Policy (See Section V below entitled 'Employee Loyalty and Conflict of Interest') in organizations with whom Life Care does business, such as vendors, supplie[r]s, agents, customers, contractors, licensees or sponsors;

* * *

V. EMPLOYEE LOYALTY AND CONFLICTS OF INTEREST

Life Care expects its employees to serve Life Care with undivided loyalty. You should put Life Care's interests ahead of any other business or commercial interest you may have as an individual. You should avoid situations in which a conflict of interest could arise. Disclose any potential conflict of interest you may have regarding [y]our responsibilities to Life Care and remove the conflict. Provide services to all persons who require them, regardless of race, color, creed, age, handicap, sexual orientation, national origin, marital status or source of payment[.]

> Life Care expects each employee to recognize and avoid activities and relationships that involve or might appear to involve conflicts of interest, and to avoid behavior that may cause embarrassment to Life Care or compromise its integrity.
>
> * * *
>
> As you contemplate a particular situation, consideration of the following factors may help you arrive at a satisfactory answer:
>
> • Is my action consistent with Life Care's practices?
>
> • Does my action give the appearance of impropriety?
>
> • Will the action bring discredit to any associate or management employee or to Life Care, if it is disclosed to the public?

(Capitalization in original.)

President's tenure began uneventfully; both he and Company were apparently satisfied with how things were going throughout much of 2002. As the six-month anniversary of his start date neared, President approached Owner to inform him that he had been thus far unsuccessful in his efforts to sell his ownership interest in Vanguard, as required by the "special obligations" of Exhibit 8. Owner told him this was not a problem and gave him some friendly advice on how to proceed. Meanwhile, although the employment agreement called for President to receive his $1.5 million in equity interest within six months, this did not occur. Nothing in the record suggests that President complained about the failure of this transaction to be consummated in a timely matter, nor is there any indication that Company's failure to give President his equity was linked to President's delay in selling his interest in Vanguard. Owner would later testify that he did not know why President did not receive the equity positions within the six-month time frame. In any event, although neither of these six-month deadlines were adhered to, the parties were still on good terms when that point in time passed, and President's status remained apparently secure, into the seventh and eighth month of his tenure.

In late August 2002, however, things rapidly turned sour. President's secretary, Dorothy Beavers, discovered a number of e-mails containing correspondences between President and various companies with which he had either ongoing or residual business relationships. Because these companies also had dealings with Company, Beavers worried that President's e-mails might raise conflict-of-interest or kickback concerns, so she printed them out and took them to Stan Burton, a senior vice president. Burton then brought the e-mails to James Ziegler, the Company's chief financial officer and a member of its Corporate Integrity Services board.

Burton and Ziegler were both unaware of the details of President's agreement with Owner, and were not privy to any prior disclosures of his potential conflicts, such as those made in Exhibit 5. Like Beavers, they were concerned about the e-mails. Of particular concern were President's communications with Cignify, a Fulcrum vendor, because Company had recently entered into a contract with Cignify – a contract that President had proposed at a Board of Directors meeting on May 22, 2002. President argues that, although he did not specifically disclose his relationship with Cignify at that board, he had previously disclosed it to Owner, and that should have been sufficient. In addition, he notes that the contract would not have resulted in any income to him personally.

Burton and Ziegler promptly brought the e-mails to Owner's attention. Owner's testimony indicates that he was shocked at the extent to which President was still involved with the companies in question, and that he feared President's dealings could expose Company to potential liability for violating so-called kickback statutes. The trial court eventually found that no laws had been violated, but Owner testified that he believed President was "about to" violate the law. In any event, Owner deemed the e-mails proof that President had violated their agreement, and he asked for President's resignation. President resigned on August 28, 2002. Both parties agree that this was a forced resignation or firing which amounted to a termination.

Despite the contractual language stating that President would receive a $500,000 severance if he left Company "for any reason," it refused to pay the severance, and also refused to give him the approximately $1.5 million in nursing home equity positions. President claims he is entitled to both; Company says he is due neither. At trial, when asked why he believed President is not entitled to the $500,000 severance, Owner testified:

> I've always considered compensation for honest service, and I've never given it a second thought that if something happens that is a breach of that, it would not be due. In other words, it would have, whether [President's violations were] intentional or unintentional, it just seemed to me that that would not be due.

The trial court disagreed, awarding President the $500,000 severance. However, the court declined to award him the $1.5 million in equity. The court announced and explained its decision in a memorandum opinion, as follows:

> [Q]uite frankly, I have never seen a contract with this type of language, and I have seen no case law with a contract with this type of language, but this basically is a contract case.
>
> I've reviewed all of the documents and the evidence that was submitted in this case. There was an offer of employment by the [Company] and an acceptance of that employment by the [President], and there was consideration for the contract. This is an employment contract between the parties. The contract was specific in most of its

terms and was negotiated between the parties, both of whom were knowledgeable of the industry in which they were effectuating this employment contract.

At issue in this case is the language in the contract stating that [President] would receive five hundred thousand dollars in severance pay if [President] left for any reason. Those terms "for any reason" are clear and unambiguous. The [Company] knew to some extent the business relationships [President] was involved in, but I am convinced did not know all the specifics. The question for this Court is: Would any perceived unethical or illegal behavior, whether it is as perceived or, in fact, illegal or unethical, void this contract?

The failure to divulge his relationship at the board meeting with a vendor, as was being voted upon, with whom he had a prior relationship was not proper by the [President] and failure to completely divest himself of all interest in the companies was a violation of his agreement on Exhibit 8, but there is no proof in this case that any anti-kickback statutes were violated or that any law was violated.

I am convinced in this case that the [Company] was concerned about the appearance of violations and felt that the statute was or could possibly be violated. Certainly, if the [President] and [Company] had clarified with each other in specifics the different companies and involvement or if there had been a complete listing, which I think may have been contemplated by the code of conduct, there would not have been any issues to raise in this case. I do believe the [Company] received Exhibit 5 during the negotiation process and knew that there were certain companies that the [President] was involved in.

Because of that, I find that the [President] completed a consummation of the contract of employment the day that he accepted employment and the day that he began employment with [Company], thereby, kicking in, so to speak, the severance provision, which is not to be construed in this case as a penalty provision but as a consideration for him leaving his other business interests.

However, I also find that [President], while he did not lie or misrepresent, he failed to make full written disclosure of his business interests to [Owner], and the equity portion of the contract will be ineffective because there was no immediate duty on behalf of

> [Company] to pay any of those equity positions. Those positions, I think, determine whether the contract was subsequently breached.
>
> I think the proof in this case is that the [President] did a good job for the company. There's no proof that any law was violated, but while nothing happened in this case that was a violation of law or statute, there was an appearance of or an impression of a conflict of interest that is a violation of the code of conduct of [Company], and, therefore, [President] is not entitled to his equity position in the two [nursing homes], and they did have the right to terminate him.

Company appeals. President also raises issues.

We will begin by addressing Company's arguments that President was entitled to neither of the two subject "entitlements," and we will then turn to President's contentions that he should have gotten not just the $500,000 but the $1.5 million as well.

II.

A.

Our review is *de novo* upon the record of the proceedings below, but that record comes to us with a presumption that the trial judge's factual findings are correct. Tenn. R. App. P. 13(d). We must honor this presumption unless we find that the evidence preponderates against those findings. ***Id.***; ***Hass v. Knighton***, 676 S.W.2d 554, 555 (Tenn. 1984). There is, however, no presumption of correctness with regard to the trial court's conclusions on matters of law. ***Taylor v. Fezell***, 158 S.W.3d 352, 357 (Tenn. 2005).

The construction of a contract is a matter of law. ***Barnes v. Barnes***, 193 S.W.3d 495, 498 (Tenn. 2006). Likewise, "[t]he ascertainment of the intention of the parties to a written contract is a question of law or judicial function for the court to perform when the language is plain, simple and unambiguous." ***Forde v. Fisk Univ.***, 661 S.W.2d 883, 886 (Tenn. Ct. App. 1983) (citing ***Petty v. Sloan***, 277 S.W.2d 355, 358 (Tenn. 1955)). Thus, our standard of review with regard to these issues is *de novo* with no presumption of correctness.

On the other hand, "[t]he existence of bad faith is a question of fact." ***Sun Splash Painting, Inc. v. Homestead Vill., Inc.***, No. M2002-00853-COA-R3-CV, 2003 WL 22345482, *2 (Tenn. Ct. App. M.S., filed October 15, 2003). As with other factual findings, a trial court's ruling on the issue of bad faith "is accompanied with a presumption of correctness and will not be overturned on appeal absent a preponderance of evidence to the contrary." ***Id.*** The presumption is particularly strong where witness credibility is at issue – as it often is with regard to questions of good and bad faith – because "[t]he trial court is uniquely positioned to observe the manner and demeanor of witnesses, and so appellate courts accord particular deference to trial court findings that depend upon weighing

the value or credibility of competing oral testimony." ***Fell v. Rambo***, 36 S.W.3d 837, 846 (Tenn. Ct. App. 2000). *See also* ***Worsham v. Action Realtors, Inc.***, No. 03A01-9412-CV-00428, 1995 WL 238398, *3 (Tenn. Ct. App. E.S., filed April 21, 1995) (upholding trial court's finding that the defendants "were not acting in good faith" because "[s]ince the trial judge has the opportunity to observe the manner and demeanor of the witnesses as they testify, the credibility accorded by the trier of fact will be given great weight by the appellate court").

B.

The first issue we must decide is whether the trial court erred in its interpretation of the contract in this case. Specifically, did the court err in holding that the language guaranteeing President the $500,000 upon his departure "for any reason" was unambiguous?

In interpreting the contract, we must keep in mind several basic tenets of contract law. For instance, the language in dispute must be examined in the context of the entire agreement. ***Cocke County Bd. of Highway Comm'rs v. Newport Utils. Bd.***, 690 S.W.2d 231, 237 (Tenn. 1985). "All provisions of a contract should be construed as in harmony with each other, if such construction can be reasonably made, so as to avoid repugnancy between the several provisions of a single contract." ***Rainey v. Stansell***, 836 S.W.2d 117, 119 (Tenn. Ct. App. 1992). Also, words must be given their usual and ordinary interpretation. ***St. Paul Surplus Lines Ins. Co. v. Bishops Gate Ins. Co.***, 725 S.W.2d 948, 951 (Tenn. Ct. App. 1986). "A strained construction may not be placed on the language used to find ambiguity where none exists." ***Farmers-Peoples Bank v. Clemmer***, 519 S.W.2d 801, 805 (Tenn. 1975).

The language of a contract is ambiguous when its meaning is uncertain and when it can be fairly construed in more than one way. ***Id.*** "An ambiguity does not arise in a contract merely because the parties may differ as to interpretations of certain of its provisions." ***Cookeville Gynecology & Obstetrics, P.C. v. Southeastern Data Sys., Inc.***, 884 S.W.2d 458, 462 (Tenn. Ct. App. 1994). "Neither the parties nor the courts can create an ambiguity where none exists in a contract." ***Id.***

"The cardinal rule for interpretation of contracts is to ascertain the intention of the parties and to give effect to that intention consistent with legal principles." ***Rainey,*** 836 S.W.2d at 118. Of course, the "intention of the parties" refers to their intention when the contract was made, not their desired interpretations after a dispute arises. The court will look to the material contained within the four corners of the contract to ascertain its meaning as an expression of the parties' intent. ***Bob Pearsall Motors, Inc. v. Regal Chrysler-Plymouth, Inc.***, 521 S.W.2d 578, 580 (Tenn. 1975). Therefore, if a contractual clause, read in the proper context, unambiguously mandates a particular result, we will not disturb that result merely because it may be harsh for one party or the other. As stated in ***Wright Med. Tech., Inc. v. Orthomatrix, Inc.***,

> [i]f there is no ambiguity, the court must interpret the contract as written, rather than according to the unexpressed intention of one of

> the parties. ***Sutton v. First Nat. [Bank] of Crossville***, 620 S.W.2d 526 (Tenn. Ct. App. 1981). Courts do not make contracts for the parties but can only enforce the contract which the parties themselves have made. ***McKee v. Continental Ins. Co.***, 191 Tenn. 413, 234 S.W.2d 830, 22 ALR2d 980 (1950).

No. W2000-02744-COA-R3-CV, 2001 WL 523992, *3 (Tenn. Ct. App. W.S., filed May 17, 2001). "The courts will not make a new contract for parties who have spoken for themselves, and will not relieve parties of their contractual obligations simply because these obligations later prove to be burdensome or unwise." ***Vargo v. Lincoln Brass Works, Inc.***, 115 S.W.3d 487, 492 (Tenn. Ct. App. 2003) (citations omitted).

Finally, "when called upon to interpret a contract, the courts may not favor either party." ***Marshall v. Jackson & Jones Oils, Inc.***, 20 S.W.3d 678, 682 (Tenn. Ct. App. 1999). "However, when a contract contains ambiguous provisions, those provisions will be construed against the party responsible for drafting them." ***Id.*** Yet, this rule of construction only arises *when there is an ambiguity*, and again, we will not give contractual language a strained interpretation in order to find an ambiguity to construe against the drafter.

Before we can interpret a contract's terms to see whether they are unambiguous, we of course must determine what constitutes the contract in the first place. "An employment agreement may be written, oral, or a combination of the two. If written, it may be memorialized in a single document or in a series of documents." ***Vargo***, 115 S.W.3d at 491. Additional documents may be included in a contract "by attachment or by reference." ***Union Serv. Indus., Inc. v. Sloan***, No. 88-127-II, 1988 WL 99722, *4 (Tenn. Ct. App. M.S., filed September 28, 1988). "Any number of papers may be taken together to make out the written expression of the contract of the parties, provided there is sufficient connection between the papers." ***Springfield Tobacco Redryers Corp. v. City of Springfield***, 293 S.W.2d 189, 197 (Tenn. Ct. App. 1956). "When the parties' agreement is contained in more than one document, all the documents should be considered together." ***Ewing v. Smith***, No. 85-294-II, 1986 WL 2582, *3 (Tenn. Ct. App. M.S., filed February 26, 1986).

In the instant case, Company asserts that President's contract is comprised of four documents and an oral agreement. The four documents are: Exhibit 3, "Life Care Center's [sic] of America Outline for the President Position," dated September 22, 2001; Exhibit 8, "Revised Information Related to the President Role," dated October 5, 2001; Exhibit 7, a letter from Owner to President dated October 12, 2001 (to which Exhibit 8 was attached); and Exhibit 20, the Code of Conduct, acknowledged and agreed to by President on January 2, 2002. The oral agreement, according to Company's brief, was a promise "that Wager would divest himself of his involvement with Fulcrom [sic] Management and its partner vendors after January 2, 2002, certainly with respect to new business ventures with partner vendors." As noted earlier, Owner believed that this agreement required "total divestiture."

The purported oral portion of the contract will be a key issue in our later discussion of other issues in this case, but with regard to this first issue – whether the severance agreement is ambiguous – we need only consider Exhibits 3 and 8, as none of the other purported parts of the contract have any terms relating to this issue.

We hold that Exhibit 8 is a modification of Exhibit 3. President drafted Exhibit 3 and sent it to Owner on September 21. They held a face-to-face negotiation on October 1, at which meeting Owner proposed a modification to the compensation scheme proposed in Exhibit 3. After the meeting, President drafted Exhibit 8, reflecting the compromise they had reached face-to-face, and sent Exhibit 8 to Owner on October 5. Owner agreed to the terms of Exhibit 8, and on October 12, both parties initialed it, thus formalizing their agreement.

"The question of whether a *later* contract is independent to or incorporated with a *prior* written agreement is to be determined by the intention of the parties as expressed in the later agreement." ***Flightless-N-Bird Farm, Inc. v. Dughman***, No. 01A01-9803-CV-00126, 1999 WL 22376, *2 (Tenn. Ct. App. M.S., filed January 21, 1999) (emphasis in original). Exhibit 8, the later agreement in this case, appears to implicitly refer back to Exhibit 3 both in its title – "*Revised* Information Related to the President Role" (emphasis added) – and in the section titled "Other Aspects of the Role," which states, "[t]he other details regarding the role, responsibilities, etc[.] appear to be agreed to." We read these portions of Exhibit 8 as references to the job-related terms in Exhibit 3, and thus we believe that Exhibit 3, to the extent it was not changed or modified by Exhibit 8, was intended to be merged into the parties' agreement. However, insofar as there is any conflict between Exhibits 3 and 8, the latter necessarily controls, as it is a modification of the former. Specifically, we note that Exhibit 8 modifies the compensation scheme outlined in Exhibit 3, and that these modifications were made at Owner's behest (and thus, according to basic agency principles, at Company's behest). Having rejected certain terms in Exhibit 3, leading to the modifications reflected in Exhibit 8, Company cannot now claim that the rejected Exhibit 3 terms create ambiguity with regard to the meaning of Exhibit 8. Owner acknowledged the differences between the exhibits in his testimony at trial, stating:

> Exhibit 3 is, in my mind, not consistent with Exhibit 8. . . . [O]ne could just take the two at face wording and realize that evidently Exhibit 3 dated September 22 might not be relevant. There's portions of it that seem to be because they talk about duties, but you get over to Exhibit 8 and it doesn't talk about duties at all. . . . And . . . there are other inconsistencies like salary . . .

Because some of the topics covered in Exhibit 3, such as duties, are not mentioned at all in Exhibit 8, and because the latter refers back to the former with regard to those topics, we do not find Exhibit 3 entirely "not . . . relevant." However, we certainly do not find portions of Exhibit 8 ambiguous merely because they are inconsistent with those portions of Exhibit 3 that Exhibit 8 was specifically intended to modify.

The language of Exhibit 8 – the latter of the two relevant documents – relating to President's severance is very simple, straightforward, and on its face, unambiguous. As noted earlier, it says:

> **Severance Package**
> • Upon leaving employment of Life Care *for any reason*, a payment will be made to Wager in the amount of $500,0000.

(Formatting in original; emphasis added.) This provision is not directly contradicted by anything in Exhibit 3 – and even if it were, as noted above, Exhibit 8, the "revision" of Exhibit 3, would control.

Company contends that the "Severance Package" language in Exhibit 8 is ambiguous when viewed in the context of the contract as whole, in particular the portion of Exhibit 3 regarding "voluntary termination without penalty." That section reads:

> CAUSE FOR VOLUNATARY [SIC] TERMINATION W/OUT PENALITY [SIC]
>
> Wager is agreeing to join Life Care as President, with the mutual understanding as to the basic areas of responsibilities, authority, title, and communication expectations with the Chairman. This role may well be expanded in the future by mutual agreement. If the role is materially reduced in scope, authority, title, or there are significant barriers to performance of the role that are created by the Chairman, or could be reasonably be removed by the Chairman and are not, the following process is to follow:
>
> - President should notify the Chairman of the situation first verbally, but finally in writing.
> - If the President's role remains restricted or redefined from the description originally agreed to, or barriers that could reasonably be removed are not, and the Chairman has been notified in writing, after an additional 60 days, the President can choose to be "released" from the role.
> - Released from the role, as defined in this section, means that Wager can determine at his sole [discretion] that the changes or barriers are such that he can not perform in the role as originally defined. In this case, Wager can choose to be leave the employment of Life Care without penalty. If Wager chooses to be "released" as described here, the following will be the case:
>   - One year of severance pay will be paid by Life Care, paid on the routine pay cycle for employees.
>   - Any deferred payment amounts that would otherwise be accrued, even if not currently vested, will become

> immediately vested, including those that would have become available within the one year severance period, will become due and payable within 180 days of this termination, or "release".

Company contends that this section of Exhibit 3 suggests that the "Severance Package" described in Exhibit 8 was only intended to apply in the case of "voluntary termination," thus creating ambiguity in Exhibit 8's otherwise unambiguous phrase "for any reason." Company's brief argues as follows:

> Life Care submits when the language "leaving employment" in Exhibit 8 is read together with the like provisions [i.e., the "voluntary termination" section] in Exhibit 3, "leaving employment" means a circumstance in which Life Care has taken some action which restricts or redefines Wager's role with the company and he chooses to resign. The Agreement as a whole does not envision or provide for a payment to Wager in the event Wager is essentially terminated by Life Care because of Wager's conduct. This construction and interpretation takes into consideration the entire Agreement between the parties and prohibits Wager from profiting from his own misconduct.

We cannot accept this interpretation of the contract's terms. Company wishes that the "language 'leaving employment' . . . [be] read together with" the provisions regarding voluntary termination, but the phrase at issue is not simply "leaving employment"; the phrase is "leaving employment . . . *for any reason*." (Emphasis added.) Even when "read together with" Exhibit 3, the plain meaning of this critical phrase does not change. The language "for any reason" is not difficult to understand. There is nothing in this record to suggest that it means anything other than what it says.

Even if we were to accept Company's argument that Exhibit 3, had it not been modified, would have limited President's recovery to "a circumstance in which [Company] has taken some action which restricts or redefines [President's] role with the company and he chooses to resign," we are constrained to hold that Exhibit 8 – the "revision" of Exhibit 3 – altered this portion of contract. As President explained at trial, the "for any reason" clause *replaced* the "voluntary termination" clause:

> The way we dealt with all that other stuff that was written out like here's how we're going to communicate, here's how we're going to do that, here's what happens if you're not . . . letting me do my role, all that kind of minutia [sic], the solution finally was this. Any reason. Let's not put all these details in because it's not working. So we'll just say this. If I leave for any reason. Now we don't need all those details.

Nothing in Exhibit 3, nor any other portion of the contract, changes the basic fact that, in Exhibit 8, Company unambiguously promised to pay President a severance of $500,000 upon "leaving employment of Life Care for any reason." This may be a harsh or unpleasant result for Company, but it is the contract they agreed to, and again, we will not alter a contract that the parties agreed to merely because it creates a harsh or unpleasant (to one side) result, particularly when the contract is between two parties of relatively equal bargaining power, both of whom are major commercial players in this industry. We therefore find Company's claim of ambiguity on this point to be without merit.

C.

Company makes a valid point, however, when it argues that President should not be allowed to "profit[] from his own misconduct" if such a result can be avoided. This is where the implied covenant of good faith and fair dealing comes in. Company correctly notes that Tennessee law imposes such a duty in every contract. As stated by the Supreme Court,

> there is implied in every contract a duty of good faith and fair dealing in its performance and enforcement, and a person is presumed to know the law. *See* Restatement (2d) Contracts, § 205 (1979). What this duty consists of, however, depends upon the individual contract in each case. In construing contracts, courts look to the language of the instrument and to the intention of the parties, and impose a construction which is fair and reasonable.

Wallace v. Nat'l Bank of Commerce, 938 S.W.2d 684, 686 (Tenn. 1996) (quoting ***TSC Indus., Inc. v. Tomlin***, 743 S.W.2d 169, 173 (Tenn. Ct. App. 1987)).

The covenant of good faith and fair dealing would certainly negate Company's obligation to pay President his promised severance if, for instance, he had voluntarily quit after just one day. Similarly, if he were dismissed – or asked to resign – after committing an act of violence in the workplace, or after engaging in an egregious course of misconduct obviously intended to get him fired, he would assuredly have breached his duty of good faith and fair dealing, and would not be entitled to the $500,000. Those hypothetical scenarios are deliberately extreme, of course, and we do not suggest that the duty would only arise in such unusual cases. The point is simply that the duty of good faith and fair dealing is precisely the right vehicle to prevent a party from "profiting from his own misconduct." Thus, good faith and fair dealing is the answer to the hypothetical scenarios mentioned at trial by Company's attorney: if President had "showed up on January the 5th, worked half a day and said, I don't think I want to come in the next two or three weeks and just left," or if he "had been on the job for a month and [was] offered by a competing nursing home company two million dollars a year salary and chose to leave," Company could have relied upon a breach of the covenant of good faith and fair dealing. Needless to say, however, those are not the facts before us.

The question in the instant case is not whether, in the abstract, this contract potentially could potentially have allowed President to profit from his own misconduct; it is whether, on the record before us, President in fact acted in bad faith, such that the covenant of good faith and fair dealing would act to prevent his recovery. Or, more precisely, the question is whether the evidence in this record preponderates against the trial court's factual finding that President did not act in bad faith.

The trial court's memorandum opinion makes clear that the court believed President did not act in bad faith. It states that President "did not lie or misrepresent," that "there is no proof in this case that any anti-kickback statutes were violated or that any law was violated," that Company did in fact receive an e-mail from President listing his potential conflicts "during the negotiation process," and that President "did a good job for the company." These statements are inconsistent with a finding that President acted in bad faith.

Four witnesses testified orally at trial, including the two parties whose conduct is most directly relevant to the good faith determination: President and Owner. These witnesses gave very different accounts of the nature of their agreement and the facts and implications of President's alleged violations thereof. The trial court weighed their testimony along with the rest of the evidence and obviously found that neither man acted in bad faith. Because this is a factual finding based upon oral testimony by witnesses whose credibility was necessarily an issue, the trial court's ruling is entitled to "great weight." ***Worsham***, 1995 WL 238398 at *3. Like the court in ***Fell***, we are "reluctant to use the paper record to second-guess the trial court's determination of the relative value of . . . conflicting testimony." 36 S.W.3d at 847. However, we have reviewed the record for evidence that would, *in toto*, clearly preponderate against the trial court's ruling in spite of the deference given to its credibility determination. We have found no such preponderance.

The parties' differing interpretations of President's e-mail messages concerning Fulcrum, Waste Tech, KVM and Vanguard – Exhibits 10-15, 17-19 and 30 – are representative of the dispute over bad faith. President's brief on appeal lists these e-mails and argues in some detail why each one does not "indicate[] any breach of the agreement or violation of law or the Life Care Code of Conduct (in fact quite to the contrary)." Specifically, President contends the e-mails "concerned either the 'wrapping up' of prior business deals," which President believed he was entitled to do under his agreement with Company, or "admonish[ed] the vend[o]r to deal with Life Care through official channels [rather than through President] which is what [President] was supposed to do." By contrast, Company's reply brief lists the very same e-mails and also discusses them in detail, but puts a very different spin on each one, arguing that they "indicate and show that after assuming the role of President of Life Care, Wager was still soliciting business with partner vendors which would provide income for him for many years."

Neither party's arguments about the disputed e-mails are obviously unreasonable on their face; they are simply differing interpretations of the same set of documents. It is evident that the trial court looked at these documents, considered the oral testimony, and concluded that the proper interpretation lay somewhere in between the positions being advocated by each party. Hence the court's statement that President "did not lie or misrepresent" his business relationships, and did not

violate any laws, but did create the "appearance of or an impression of a conflict of interest." Similarly, the court held that President "failed to make *full* written disclosure" (emphasis added), but did disclose enough that Company "knew to some extent the business relationships [President] was involved in, but I am convinced did not know all the specifics." In essence, the court's findings appear to lend themselves to the conclusion that the parties had, as President testified that Company's general counsel told him, a "terrible misunderstanding." Indeed, the court opined in its memorandum opinion that "if [President] and [Company] had clarified with each other in specifics the different companies and involvement . . . there would not have been any issues to raise in this case." Based on our review of the record, we cannot find that the evidence preponderates against this conclusion, nor against the related conclusion that President did not act in bad faith. We therefore affirm the trial court's determination that the implied covenant of good faith and fair dealing does not bar President from receiving the $500,000 severance.

D.

Company attempts to disturb the trial court's ruling on four other grounds, each of which merit only brief discussion.

Company argues that President forfeited the $500,000 severance by violating a fiduciary duty of loyalty and good faith. We reject this contention for the same reason we reject Company's good faith and fair dealing argument. The trial court found that President did not act in bad faith, and the evidence does not preponderate against that finding. Similarly, the evidence does not preponderate against the court's implicit holding that President was not disloyal. The court did not commit error by finding no breach of fiduciary duty.

Company next contends that the $500,000 severance "is unenforceable as it promotes a violation of criminal law." There are two major problems with this argument. First, as already noted, the court found that President did not violate any criminal law, and the evidence does not preponderate against that finding. Second, even if President had broken the law, it does not necessarily follow that a generalized severance agreement, which is not in any way predicated on or related to such illegal conduct, would *promote* the legal violation in question. Company's cited examples of contracts promoting illegal activity are clearly distinguishable, as they involve a much more direct link between the contract and the illegality: a commission agreement with an unlicensed broker, ***Binswanger Southern Inc. v. Textron, Inc.***, 860 S.W.2d 862 (Tenn. Ct. App. 1993), and a contract charging rates illegal under federal law, ***New River Lumber Co. v. Tenn. Ry. Co.***, 238 S.W. 867 (Tenn. 1922). By contrast, any connection between the severance package and allegedly illegal conduct in the instant case is simply not demonstrated by the evidence.

Company also argues that the trial court erred in not declaring the $500,000 severance to be an illegal penalty provision, unenforceable as a matter of law. However, the trial court specifically held that the severance provision "is not to be construed in this case as a penalty provision but as a consideration for him leaving his other business interests." The evidence does not preponderate against this determination. Company suggests that the $500,000 must necessarily be a penalty

because its payment is not conditioned on a breach of contract by Company. However, the very case that Company relies upon, ***Guiliano v. Cleo, Inc.***., 995 S.W.2d 88 (Tenn. 1999), contradicts this assertion. The Supreme Court in ***Guiliano*** explained that "the recovery of severance pay is not conditioned upon a breach of contract" but rather is intended "to offset the employee's monetary losses attributable to the dismissal from employment." ***Id***. At 96-97. That is precisely the motivation for the severance agreement in this case, according to the trial court's opinion and the evidence in the record. President sought not to impose a penalty, nor to specify what the damages for a breach of contract would be, but rather to ensure his own financial security from "day one," in light of the investments he was giving up and Company's purported history of a revolving-door presidency.

Finally, Company asserts that equitable estoppel bars President's claim. Upon closer inspection, however, this argument is merely a rehash of the good faith and fair dealing argument that we rejected above. Company asserts that President's "conduct was disloyal to Life Care, unconscientious and inequitable" and that he "does not appear in this Court with 'clean hands.'" Therefore, Company argues, he should be estopped from recovering. We simply reiterate that the court found no bad faith on President's part, and the evidence does not preponderate against this finding. Therefore this argument is without merit.

For all of the foregoing reasons, we affirm the Trial Court's award of $500,000 in damages to President based upon the severance pay language in the contract.

III.

A.

As noted earlier, Company is not the only party in this case claiming it was wronged by the result below. President asserts that Company should have paid him not just the $500,000 severance but the approximately $1,500,000 in equity as well, and that the trial court erred in failing to award him this amount.

In support of this claim, President argues that the equity positions, payable within six months according to Exhibit 8, were "unconditional in the contract," and that in any event, President "did not violate any terms of the employment agreement because he fully disclosed his business relationships orally and in writing and he performed all the requirements of the agreement."

Exhibit 8 states that "[d]uring the first six months of employment Wager will be given" the equity positions. We agree that this language creates a duty to pay President the promised equity positions within six months. This is contrary to the holding of the trial court, that "there was no immediate duty on behalf of Life Care to pay any of those equity positions." On the contrary, we hold that Exhibit 8 created an "immediate duty" effective July 2, 2002, six months after President's start date, to pay the equity positions. However, as detailed herein, President's breaches of contract, which began prior to July 2, 2002, vitiated that duty. Thus, although we disagree with the trial

court's rationale, we agree with its conclusion. "[W]e are called upon ultimately to pass upon the correctness of the result reached in the proceeding below, not necessarily the reasoning employed to reach the result. . . . [A] correct judgment of a trial court should not be reversed on appeal merely because it was based upon an insufficient or wrong reason." ***Kelly v. Kelly***, 679 S.W.2d, 458, 460 (Tenn. Ct. App. 1984).

Unlike the severance promise, there is no "for any reason" language that would make the duty to pay the equity positions explicitly unconditional. Instead, under well-established principles of contract law, the duty is implicitly conditioned upon President's fulfillment of his end of the bargain. "[P]rior misconduct of the employee excuses the employer's subsequent breach." ***Teter v. Republic Parking Sys., Inc.***, 181 S.W.3d 330, 339 (Tenn. 2005).

B.

As noted earlier, the trial court found that President breached the contract, albeit not in bad faith. The court held that although President did not lie, misrepresent or break the law, he failed to make a full written disclosure of his business interests and acted in a manner that created the "appearance of or an impression of a conflict of interest." We will return to these factual findings momentarily to consider whether the evidence preponderates against them. For present purposes, however, we will assume they are supportable. The question then becomes: if President breached the contract, can Company therefore withhold his promised equity positions?

The answer is all in the timing. The trial court's factual finding that President breached the contract is based on conduct that occurred prior to July 2, 2002, the six-month anniversary of President's start: President's disputed e-mail messages concerning Fulcrum, Waste Tech, KVM and Vanguard were all sent between January and April, and the board meeting at which he failed to make a full disclosure of his ties to Cignify took place in May. Therefore, by the time he became entitled to the equity positions on July 2, President had already breached his contract. According to the principle of mutuality of obligation, this would mean that Company was entitled to withhold the equity positions.

As noted earlier, however, the record does not reflect Company's actual reason for failing to give President the equity positions on or before July 2. Moreover, although President breached the contract well before July 2, Company did not discover those breaches until August. This brings us to the doctrine of after-acquired evidence. The Restatement gives the following example of the doctrine:

> A and B make an employment contract. After the service has begun, A, the employee, commits a material breach of his duty to give efficient service that would justify B in discharging him. B is not aware of this but discharges A for an inadequate reason. A has no claim against B for discharging him.

Restatement (Second) of Contracts § 237 (1981), comment c, illustration 8 (adopted by ***Teter***, 181 S.W.3d at 340). In the instant case, the facts are even more favorable to the employer, since Company's present justification for President's discharge is the same as its original reason for discharging him; only the timing of the discovery of the relevant facts is at issue. In other words, this is not a case where an employer is "fishing for any misconduct in the employee's past in order to justify [a] firing" that was, in reality, premised on other grounds. ***Teter***, S.W.3d at 341. On the contrary, this is a case where an employer eventually did fire its employee because of the very misconduct in question.

The Supreme Court made clear in ***Teter*** that Tennessee allows the use of after-acquired evidence:

> [A]n employer may use after-acquired evidence of employee misconduct in defense of a breach of contract case if the employer can demonstrate that it would have fired the employee had it known of the misconduct. . . . [T]he evidence [that the employer would have fired the employee] need only be shown by a preponderance of the evidence.
>
> * * *
>
> Courts allowing the use of after-acquired evidence have required the employer to show that (1) the employee was guilty of some misconduct of which the employer was unaware; (2) the misconduct would have justified discharge of the employee; and (3) had the employer known of the misconduct, the employer would have discharged the employee. We agree that in a breach of contract case, "after-acquired evidence of employee misconduct is a defense to a breach of contract action for wages and benefits lost as a result of the discharge if the employer can demonstrate that it would have fired the employee had it known of the misconduct."

Id. at 339-40 (citations omitted). The dispositive question, therefore, is whether Company would have fired President if it had known about the misconduct in question prior to July 2, 2002. This question is easy to answer. We need not engage in speculation to answer it. After all, as soon as Company learned of President's misconduct, it *did* fire him, and the misconduct in question *was* its reason for doing so.[1] It follows logically that, if Company had known about the identical misconduct prior to July 2, it would have fired him then. The requirements of ***Teter*** are thus satisfied, and the after-acquired evidence doctrine applies. Under these circumstances, the timing of Company's

[1] The trial court explained that it believed Company's concern over that misconduct was genuine: "I am convinced in this case that[Company] was concerned about the appearance of violations and felt that the [anti-kickback] statute was or could possibly be violated."

discovery of President's breaches of contract should not take precedence over the timing of the breaches themselves.

C.

Returning to the factual question of whether President breached the contract, we note that President advances several arguments for the proposition that he did not commit any breach. He argues that Exhibit 5 constitutes full written notice of all his potentially problematic business relationships; that he did not violate any duty by failing to disclose his relationship with Cignify at the board meeting in which a contract with Cignify was considered, because he had already told his supervisor, who was also the chairman of the board, about this relationship months earlier; and that his actions "cannot be said to have created an 'appearance of a conflict of interest.'" Further, he argues that an apparent conflict of interest would not be a breach of contract. As stated in President's brief,

> [t]he code of conduct never mentions an "appearance of a conflict of interest". We are familiar with that concept in the context of the legal professions where the appearance of impropriety is specifically defined and prohibited. Wager fully complied with the Code of Conduct and it was improper for the Court to insert a rule into the code that is not found there and then use it to deny Wager's recovery.

We will address this last issue first because it is the easiest to dispose of, and also because the concept of apparent impropriety is central to the remainder of the court's ruling. Simply put, President is flatly wrong when he asserts that the Code of Conduct "never mentions" the appearance of conflicts. As reflected in the excerpts quoted earlier in this opinion, the Code contains provisions requiring employees "to refrain from real or perceived conflicts of interest in business dealings"; to "assure that all business relationships are conducted in such a manner so that *no question may arise* as to whether any [anti-kickback] laws have been violated"; to "recognize and avoid activities and relationships that involve or *might appear to involve* conflicts of interest"; and to ask themselves whether a particular action "give[s] the appearance of impropriety." (Emphases added.) In sum, the Code repeatedly discusses the importance of appearances and perceptions, and of preventing anything that could "embarrass" Company. Therefore, if President conducted himself in a manner that created the "appearance or impression of a conflict of interest," this could certainly constitute a violation of the Code and thus a breach of contract.

As for President's claim that his actions "cannot be said to have created an 'appearance of a conflict of interest,'" this is contradicted by the record as a whole, and even by President's own testimony in particular. For instance, on cross-examination of President, the following exchange occurred:

> Q: Would you acknowledge at least, Mr. Wager, that [your relationships with Waste Tech and Cignify] would give the

> perception of a conflict of interest to [Owner], to the board, to anybody looking at it?
>
> A: It would to anybody except [Owner].

He later repeated that "[i]t could appear" that he has a conflict, and that "it might be perceived that way" by anyone unfamiliar with his prior communications with Owner.

President's defense is that he fully disclosed the apparent conflicts to Owner. Yet the court found otherwise. President asks us to find that Exhibit 5 – his October 2, 2001 e-mail to Owner – constituted full written notice. We will not do so, as the evidence does not allow us to second-guess the trial court's factual determination on this point. The October 2 e-mail mentions President's involvement in Vanguard, Fulcrum and KVM Technologies, but does not specifically discuss Cignify, Waste Tech, or other Fulcrum vendors. Nor does the mere act of mentioning various companies and briefly outlining his involvement with each one necessarily constitute full notice of every relevant fact relating to the matters under discussion. Moreover, an October 2001 e-mail certainly cannot constitute full written notice of the extent to which President *remained* involved in these companies after January 2, 2002. The trial court's belief that President and Company had a misunderstanding over the terms of their agreement, which resulted in President's failure to disclose everything he was supposed to disclose, is not disproven by Exhibit 5. The evidence does not preponderate against the trial court's ruling on this point; the court acted within its discretion by finding as a matter of fact that President did not give full notice so as to vitiate his responsibility for the apparent conflicts of interest.

Nor did the court abuse its discretion when it found that President breached his contract by failing to mention his involvement with Cignify at the board meeting where a potential contract with Cignify was at issue, notwithstanding President's prior disclosure to Owner of his involvement with Cignify. President asserts that he "had a right to rely upon the fact that since the chairman of the board (who was also his supervisor) knew about his business dealings, his participation in the meeting was not improper." However, in light of Company's heavy focus on apparent conflicts of interest, as reflected in its Code of Conduct, it was not unreasonable for the court to essentially hold President to a higher standard, namely that he should have either excused himself from the board meeting or disclosed his potential conflict to everyone in the room, to prevent even the appearance of impropriety. President himself acknowledged at trial, and in a letter to the board of directors written after his dismissal, that it was a mistake not to take such a step. Given that creating an appearance of impropriety can create a breach of contract, the evidence does not preponderate against the court's ruling on this point, either.

In sum, the evidence does not preponderate against the trial court's decision not to award President the equity positions or their equivalents.

D.

President's argument that he is entitled to the equity positions because Company failed to follow proper procedures in terminating him is without merit. The sections of the Code of Conduct that describe Company's standard investigative procedures do not prevent company from taking immediate action to terminate an employee when the circumstances require it. Indeed, the Code specifically provides that "[e]nforcement may include progressive disciplinary action, *or immediate termination* depending on the circumstances." (Emphasis added). Moreover, even if Company had failed to follow its procedures to the letter, that fact alone would not entitle President to the equity positions, in light of the other facts found above. The trial court committed no error here.

IV.

Again, the trial court's findings are reasonable, logical, and supported by the evidence. On the one hand, the court found that President did not lie, misrepresent, or otherwise act in bad faith; on the other hand, it found that Company did not act in bad faith, either. The court further found that President's actions fell short of the high standard set by Company's Code of Conduct and President's agreement with Owner, such that they constituted a breach of contract which justified Company's refusal to give President the equity after terminating him. The severance package is a different matter, however, because of the unambiguous "for any reason" language. The evidence does not preponderate against either aspect of the decision. We therefore affirm. Costs on appeal are taxed 50% to appellant Life Care Centers of America, Inc., and 50% to appellee Dick Wager. This case is remanded to the trial court for collection of costs assessed below, pursuant to applicable law.

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CHARLES D. SUSANO, JR., JUDGE